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No. 03-891

IN THE

Supreme Court of the United States

STEVEN H. STERN, Individually, and as Trustee of the Steven H. Stern, Inc. Profit Sharing Plan,

Cross-Petitioners,

v.

DAVID A. GILL, Chapter 7 Trustee,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where a pension or retirement plan has been ERISA-qualified before a participant files a bankruptcy case, does the plan lose its ERISA qualification where attrition or other changes to the participant population occurs before the bankruptcy petition is filed, but the agency (agencies) that bestowed the ERISA qualifying status in the first instance did not retract the plan's qualification nor did the plan sponsor terminate the plan under ERISA?

PARTIES TO THE PROCEEDING

Petitioner and Cross-Respondent, David A. Gill, is the Chapter 7 Trustee for the bankruptcy estate of Steven H. Stern, debtor.

Respondent and Cross-Petitioner, Steven H. Stern, is the debtor in the Steven H. Stern bankruptcy case, pending in the United States Bankruptcy Court, Central District of California, case number SV 95-16165-KL. Steven H. Stern is also the plan trustee of the Steven H. Stern, Inc., Profit Sharing Plan.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioners, Steven H. Stern, individually, and as the Trustee of the Steven H. Stern, Inc. Profit Sharing Plan (collectively, the "Plan Trustee"), conditionally cross-petition for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

OPINION BELOW

The Order and Amended Opinion (the "Amended Opinion") of the Ninth Circuit Court of Appeals is reported at 345 F.3d 1036. It amends and supersedes a prior Opinion of the Ninth Circuit reported at 317 F.3d 1111. Both Opinions are included in the appendix to the petition for writ of certiorari filed by the Petitioner.

BASIS FOR JURISDICTION

The original petition for writ of certiorari filed by Petitioner David A. Gill, Chapter 7 Trustee was docketed on December 19, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court and is conditional upon this Court's grant of Petitioner's petition for writ of certiorari.

STATUTORY AND REGULATORY PROVISIONS INVOKED

The following statutes and regulations are involved in this case.

11 U.S.C. § 541(c)(2):

A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

29 U.S.C. § 1002(2)(A):

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1341(a)(1):

(a) General rules governing single-employer plan terminations

(1) Exclusive means of plan termination.

Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under sub-section (b) of this section or a distress termination under subsection (c) of this section.

29 C.F.R. §§ 2510.3-3:

(a) General. This section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of Title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I.

(b) Plans without employees. For purposes of Title I of the Act and this chapter, the term "employee benefit plan" shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called "Keogh" or "H.R. 10" plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under Title I. However, a Keogh plan under

which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under Title I. Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to Title I.

(c) Employees. For purposes of this section:

(1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and

(2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

(d) Participant covered under the plan.

(1)(i) . . .

(ii) An individual becomes a participant covered under an employee pension plan—

(A) In the case of a plan which provides for employee contributions or defines participation to include employees who have not yet retired, on the earlier of–

(1) The date on which the individual makes a contribution, whether voluntary or mandatory, or

(2) The date designated by the plan as the date on which the individual has satisfied the plan's age and service requirements for participation, and

(B) In the case of a plan which does not provide for employee contributions and does not define participation to include employees who have not yet retired, the date on which the individual completes the first year of employment which may be taken into account in determining—

(1) Whether the individual is entitled to benefits under the plan, or

(2) The amount of benefits to which the individual is entitled, whichever results in earlier participation.

(2)(i) . . .

(ii) An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if—

(A) The entire benefit rights of the individual—

(1) Are fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization; and

(2) A contract, policy or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual; or

(B) The individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan.

(3)(i) In the case of an employee pension benefit plan, an individual who, under the terms of the plan, has incurred a one-year break in service after having become a participant covered under the plan, and who has acquired no vested right to a benefit before such break in service is not a participant covered under the plan until the individual has completed a year of service after returning to employment covered by the plan.

(ii) For purposes of paragraph (d)(3)(i) of this section, in the case of an employee pension benefit plan which is subject to section 203 of the Act the term "year of service" shall have the same meaning as in section 203(b)(2)(A) of the Act and any regulations issued under the Act and the term "one-year break in service" shall have the same meaning as in section 203(b)(3)(A) of the Act and any regulations issued under the Act.

STATEMENT OF THE CASE

Steven H. Stern is the sole shareholder and president of Steven H. Stern, Inc. ("Stern Inc.") Beginning in 1974, Steven H. Stern began saving for his retirement and while he used a variety of investment vehicles for that purpose, he always maintained his interest in the same Retirement Assets, never

transferring the Retirement Assets to anyone else. Indeed, other than market fluctuations, the corpus of the Retirement Assets has not materially changed since 1989.

As time passed, Congress and the California Legislature established or sanctioned different investment vehicles and Respondent "rolled" his Retirement Assets from one vehicle to another as the applicable laws and pertinent circumstances evolved. Prior to 1992, Stern rolled over the Retirement Assets into an Individual Retirement Account ("Rollover IRA") when the corporate sponsor of a prior corporate plan dissolved in 1989. In 1992, three years before he filed his bankruptcy case, Stern again rolled over his Retirement Assets, this time back into a corporate retirement plan because Margaret Mayersohn had become a full time employee of Stern Inc.[1] and contributions to a plan to provide for her retirement became permissible (the "1992 Rollover"). Consequently, in or about October 1992, the trustees of the Rollover IRA collectively rolled over approximately $1,525,000.00, consisting of all of Stern's fully vested Retirement Assets, into the Steven H. Stern, Inc. Profit Sharing Plan (the "New Plan") as Stern's opening beneficial interest.

As is noted above, Margaret Mayersohn's extended employment with Stern Inc. began in or about April 1992. She became a participant in the New Plan at that point, in its first plan year, in consonance with its eligibility and participation rules. Stern Inc. made regular, annual contributions to the New Plan in the fiscal years ending March 31, 1993 and March 31, 1994 for her retirement account, although nothing was added for Stern's benefit. Neither was

1. Ms. Mayersohn had been an employee for a short time in 1990 as well.

anything withdrawn by him, with two limited exceptions not relevant here. Ms. Mayersohn and Stern were married in March 1994, approximately one year before Stern filed for bankruptcy protection on August 11, 1995.

In 1998, the bankruptcy court found that Stern's Retirement Assets were excluded from the bankruptcy estate because the employee benefit plan qualified under Title I and Title II of ERISA.[2] Thereafter, in March 1999, the Ninth Circuit issued its opinion in *Lowenschuss v. Selnick (In re Lowenschuss)*, 171 F.3d 673 (9th Cir. 1999) which held that "the relevant inquiry in the bankruptcy context is whether, *on the petition date*, Debtor could have enforced under ERISA the Pension Plan's transfer restriction". *Lowenschuss*, 171 F.3d at 680 (emphasis added). Based on the *Lowenschuss* case, and because the qualifying employee (Mayersohn) married the sole shareholder (Stern) before the commencement of the bankruptcy case, both the District Court (sitting as a bankruptcy court of appeals) and the Ninth Circuit ruled that the Retirement Assets were not excluded from the bankruptcy estate.

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2. Petitioner sued to recover the Retirement Assets on a fraudulent transfer theory. He also separately objected to Stern's claim that the Retirement Assets were excluded and/or exempt from the bankruptcy estate. Both the district court and the Ninth Circuit Court of Appeals held that the Retirement Assets were fully exempt under California law and it is the subject of the Petitioner's Petition for Certiorari.

I. REASONS FOR GRANTING THE PETITION

A. *Important Public Issue.*

In *Patterson v. Shumate*, the Court stressed an important policy underlying ERISA, namely the uniform, national treatment of pension benefits. *Patterson v. Shumate*, 504 U.S. 753, 761, 112 S. Ct. 2242, 2248, 119 L. Ed. 2d 519 (1992). The Ninth Circuit's decision in *Stern* creates an exception not otherwise found in the ERISA statues and permits a plan's qualification to ebb and flow due to the mere attrition of employees and regardless of whether the administrative authorities have acted to disqualify the plan (or even specifically declined to do so) or whether the plan sponsor terminated it under ERISA. Given Congress's strict mandates regarding the establishment and termination of ERISA plans, a plan's qualification should not be affected by the happenstance of employee attrition. Stated otherwise, the Ninth Circuit erroneously concluded in *Lowenschuss* that the debtor could not enforce ERISA's restrictions on the bankruptcy petition date, merely because employees who once qualified as non-owner employees were no longer with that company as of the bankruptcy petition date. This decision has already lead to inconsistent results that conflict with Congress's intent in enacting ERISA, including the Ninth Circuit's decision on the point in *Stern*. Since the plan in *Stern* had qualified and nothing had disqualified it prior to his bankruptcy petition date, the debtor in Stern *could* enforce the ERISA restrictions, notwithstanding the fact that he had married the only other qualifying employee prior to his bankruptcy filing.

At least two lower courts have recognized the lack of helpful appellate guidance on the issue of when a plan's

ERISA status ought to be determined. *Leckey v. Stefano*, 263 F.3d 267, 270 n.3 (3rd Cir. 2001); *Glickman v. United States Healthcare Systems of Pennsylvania, Inc.*, 268 F. Supp. 2d 443, 446 n.4 (E.D. Pa. 2003). Accordingly, this Court's guidance will answer an important question of federal law, a question that is already being asked by the lower courts.

B. *Conflicts Among the Circuit Courts.*

The Ninth Circuit's decision directly conflicts with at least two other courts. *In re Baker*, 114 F.3d 636 (7th Cir. 1997) (established qualified pension plan did not lose ERISA status although only remaining participant as of the bankruptcy petition date was the majority shareholder); *Kaler v. Craig (In re Craig)*, 204 B.R. 750 (D.N.D. 1996) ("if debtor and his wife were eligible to participate where there were other employees, they should still be eligible to participate even though the other employee's interests had been paid out"). *Stern* further conflicts with the holding in *Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444 (4th Cir. 1993), wherein the Fourth Circuit ruled that the existence of non-employee owners is only relevant to determine whether a plan is qualified under Title I and does not affect whether a non-employee owner may participate in the plan.[3] In addition, the Ninth Circuit's opinion in *Stern* conflicts with the Tenth Circuit's holding that the voluntary attrition of employees does not constitute a partial termination of an ERISA plan. *Anderson v. Emergency Medicine Associates*, 860 F.2d 987 (10th Cir. 1988); *Sage v. Automation Incorporated Pension Plan and Trust*, 845 F.2d 885 (10th Cir. 1988).

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3. Whether a sole shareholder employee may participate in an employee benefit plan is before the Court in *Yates v. Henton*, 287 F.3d 521 (6th Cir. 2002), *cert. granted*, _ U.S. __, 123 S. Ct. 2637, 156 L. Ed. 2d 654 (2003).

II. A GRANT OF CERTIORARI WILL ENABLE THIS COURT TO DETERMINE AN IMPORTANT FEDERAL QUESTION, NAMELY WHETHER CONGRESS INTENDED TO ALLOW JUDICIALLY CREATED EXCEPTIONS TO TITLE I OF ERISA.

When it enacted ERISA, Congress expressed an overriding concern that a pension plan participant's actual receipt of retirement benefits should not be subject to the vagaries of financial misfortune. Congress further enacted extremely narrow rules regarding the termination of such plans and limited the circumstances in which the Plan's funds could be invaded. 29 U.S.C. § 1341(a). Indeed, this Court has routinely recognized and "vigorously enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exception to the broad statutory bar." *Patterson v. Shumate*, 504 U.S. 753, 760, 112 S. Ct. 2242, 2241, 119 L. Ed. 2d 519 (1992), quoting *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990).

The Ninth Circuit's decision in *Stern* reinforced its holding that an otherwise qualified plan can lose its qualifying status other than by an enumerated terminating event under ERISA, in this case, by a mere change in the business's work force. The cross-petition for certiorari thus presents the Court with an important complement to *Yates*, already accepted by this Court for decision in Spring 2004.

In *Yates*, the question is whether a 100% shareholder of a corporate employer, partner or sole proprietor qualifies as an "employee" participant under ERISA who is entitled to enforce restrictions against alienation in 29 U.S.C. § 1056(d) and 26 U.S.C. § 401(a)(13). *Yates v. Hendon (In re Yates)*,

287 F.3d 521 (6th Cir. 2002), *cert. granted*, __ U.S. __, 123 S. Ct. 2637, 156 L. Ed. 2d 654 (2003). This case presents an immediate and important opportunity to answer questions *Yates* must inevitably raise, but leave open. While *Yates* addresses who is an "employee" participant relative to an already established ERISA plan, this case provides the Court with the opportunity to resolve questions about whether mere changes to employees' status affects a retirement plan's qualification under ERISA. Because a given employer's employee pool will inevitably evolve, especially in the context of small business owners, this is very important to plan participants whose entire health, welfare and retirement benefits could be affected on a daily basis, and such concerns are certainly heightened during a time of financial crisis. In that case, this question becomes of paramount importance upon the filing of a bankruptcy petition to the debtor, his creditors, trustee and family.

Notwithstanding the Ninth Circuit's holdings in *Stern* and *Lowenschuss*, the pertinent date is the creation of the retirement plan, not the date of bankruptcy. While it is true that most issues concerning the scope or extent of a bankruptcy debtor's assets and liabilities are determined by reference to that debtor's date of bankruptcy, the circumstances before the Court here should be seen to be an important exception.[4]

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4. Indeed, unlike various sections of 11 U.S.C. § 541 and other sections of the bankruptcy code that specifically require scrutiny as of the petition date, 11 U.S.C. § 541(c)(2) is strikingly silent as to the date of scrutiny. *Compare* 11 U.S.C. § 541(a) and 11 U.S.C. § 541(c)(1)(B) to 11 U.S.C. § 541(c)(2). Accordingly, had Congress intended the petition date to control under 11 U.S.C. § 541(c)(2) it would provided that language in the statute.

In most instances where the debtor's date of bankruptcy becomes the focus, the operative issues involve the debtor's own circumstance, typically what she owns on that date, or whether a debt was incurred before or after that date. This is different. Here, the focus is not on something the debtor did or some characteristic of hers (such as ownership, or not, of a thing), but rather the focus is on the status and circumstances of a third party, namely whether the *plan's* status was of type A or type B. There is no logical connection between what happens to a plan and when it happens (once it is qualified), on the one hand; and the date of a participant's bankruptcy case on the other. Hence, this case also presents the Court an important opportunity to clarify how ERISA interacts with the Bankruptcy Code, something it has not had occasion to do since *Patterson*, until *Yates*, and it presents a unique opportunity to perform that clarification as a timely complement to *Yates*.

In the *Stern* case, when it was first formed, the retirement plan in question covered an "owner-employee" like Dr. Yates and an unrelated, non-owner employee. Later, but before the bankruptcy petition in question, the owner-employee (Stern) and the non-owner employee married. In Stern's case (commenced a little more than a year after the marriage), the retirement plan was held not to be ERISA-qualified *as of the bankruptcy petition date*, for want of a non-owner employee. That is, since the non-owner employee was deemed to have lost her non-owner status when she married, the plan was assumed to be disqualified under ERISA in the later bankruptcy case, despite the absence of any rescission of the plan's initial qualification.

While there is superficial logic to this result, upon scrutiny it is easy to see that it is contrary both to the pertinent

statutory language and the logical application of the law and public policy. Since the retirement plan was deemed to have lost its ERISA qualification due to a marriage that left it without non-owner employees, it follows that by this reasoning, the retirement plan could have regained its ERISA-qualified status by an expedient, well-timed divorce. The policy of the federal law should not be that expedient divorces are needed to preserve fully vested retirement funds (or for that matter, to realize any economic benefits), and these machinations would not be necessary if the existing law is clarified to confirm that so long as qualifying employees exist when an otherwise-qualified plan is created, evolving changes in those employees' personal lives do not affect the ERISA-qualification of the retirement plan itself (at least until the agencies that bestowed qualification in the first instance retract it). *See Peterson v. American Life & Health Insurance Co.*, 48 F.3d 404 (9th Cir.), *cert. denied*, 516 U.S. 942, 116 S. Ct. 377, 133 L. Ed. 2d 301 (1995) (relying on language in ERISA that makes it sufficient if a policy is *established* under ERISA, plus case law holding that individual policies are ERISA-qualified if they derive from prior qualified group policies, the court held that a health benefit policy was ERISA-qualified because at the time of its purchase it was intended to fulfill benefit.)

Policy and logic militate for a rule that changing employee circumstances do not disqualify a retirement plan. There are numerous situations where on the one hand, federal law encourages employers to establish pension plans for their employees, but on the other hand, those funds which are purposely dedicated to retirement would be in jeopardy if the attrition of an employer's work force on any given day changes things. For example, consider a corporate business, owned by two shareholders, that employs one non-owner

assistant. The corporation establishes a plan that qualifies under Title I of ERISA and the two shareholders and their assistant faithfully participate in the plan. Years later, the assistant voluntarily terminates his position and the next day, one of the shareholders files for bankruptcy. Under *Stern*, the shareholder's interest in the ERISA plan would not be excluded from the bankruptcy estate, yet it would be if the shareholder had filed for bankruptcy one day sooner. Or, if Owner I filed his bankruptcy petition the day before the assistant left, while Owner II filed his petition the day after, their respective interest in the same plan would be treated very differently in their respective bankruptcy cases, even though only 48 hours separates them. Congress could not have intended such an absurd result and this Court should now clarify that judicially created exceptions to the rules are not permitted.

III. THE NINTH CIRCUIT'S RULING CONFLICTS WITH AT LEAST FOUR OTHER CIRCUITS.

The Ninth Circuit has now ruled—twice—that the qualifying status of pension plan is determined as of the date of the bankruptcy filing of a participant. *Gill v. Stern (In re Stern)*, 345 F.3d 1036, 1041 (9th Cir. 2003); *Lowenschuss v. Selnick (In re Lowenschuss)*, 171 F.3d 673, 680 (9th Cir. 1999). In so doing, it has mandated that the mere attrition of employees can affect the ERISA qualification of a plan. The district court in the Eastern District of Pennsylvania concluded, similar to the Ninth Circuit, that a plan's ERISA qualification (in that case dealing with health benefits) changed from "ERISA-qualified" to non "ERISA-qualified" by the departure of one employee. *Glickman v. United States Healthcare Systems of Pennsylvania, Inc.*, 268 F. Supp. 2d 443 (E.D. Pa. 2003). In its reasoning, the *Glickman* court

noted the lack of any helpful appellate guidance in its reluctant reasoning. *Glickman*, 268 F. Supp. 2d at 446 n.4., citing *Leckey v. Stefano*, 263 F.3d 267, 270 n.3 (3rd Cir. 2001).

The Ninth Circuit's holding is in direct conflict with the Seventh and Eighth Circuits, and perhaps even this Court's own precedent. In *In re Baker*, 114 F.3d 636 (7th Cir. 1997), Jerome Baker and his family operated Bakco Data, Inc., which sponsored a profit-sharing plan. At one point, the Bakco profit-sharing plan had 18 participants. By the time Baker filed for bankruptcy protection, he was the only participant in the plan. In holding that the plan complied with ERISA, the Seventh Circuit reasoned that the facts in *Baker* closely resembled the facts in *Patterson*—"for Shumate was the president and chairman of a closely held corporation, and, by the time of his bankruptcy, the only participant in the firm's pension plan." *Baker*, 114 F.3d at 639. Although Shumate was the only remaining participant, this Court never called into question whether the plan qualified under ERISA. It easily follows that the Court should come to the same conclusion on almost identical facts.[5]

Similarly, the District Court in *Kaler v. Craig (In re Craig)*, 204 B.R. 750 (D.N.D. 1996) ruled that although all of the other employee participants were cashed out of the plan before the bankruptcy petition date, the sole shareholder and his wife remained participants. The court reasoned, "If Craig and his wife were eligible to participate when there

5. Without any statutory reference or legal precedent, the Ninth Circuit in *Lowenschuss* attempts to distinguish *Baker* and *Patterson* by rationalizing that in those cases, the bankruptcy debtor was not the sole owner of the companies sponsoring the pension plan. It is hard to see how that fact alone harmonizes these rulings.

were other employees, they should still be eligible to participate even though the other employee's interest have been paid out." *Craig*, 204 B.R. at 755. In its analysis, the *Craig* court relied on *In re Kaplan*, 162 B.R. 684, 695 (Bankr. E.D. Pa. 1993) in which the bankruptcy court set forth a detailed analysis as to plans that qualify under ERISA as opposed to plans that do not, in the wake of *Patterson*. The *Kaplan* court observed that in bankruptcy cases where the company's plan was held not to be qualified under ERISA, the owner (or the owner's spouse) were the only participants the respective plans *ever* had. In cases where the company's plan qualified under ERISA, the company had other employee participants when the plan was created. Although all of the other employees had been paid out, the owner-beneficiary's interest in the plan remained intact. The facts in this second scenario are the same as the facts in *Patterson* where the Court presumed that the plan was qualified under ERISA and excluded from the debtor's bankruptcy estate. The facts in the second scenarios are likewise the same facts in *Stern* where the Ninth Circuit should have ruled that Stern's interest in the New Plan was excluded from the bankruptcy estate.

The *Stern* decision also conflicts with the Fourth Circuit opinion in *Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444 (4th Cir. 1993). In *Madonia*, the Fourth Circuit explained that so long as there are other "employees" to bring the plan within the definition of an employee benefit plan under ERISA, then the sole shareholder and spouse can be participants in the plan. *Madonia*, 11 F.3d at 449-50. In the words of the Fourth Circuit,

> the regulation does not govern the issue of whether someone is a "participant" in an ERISA plan, once the existence of that plan has been established

> [because] once a plan has been established, it would be anomalous to have those person benefitting from it governed by two disparate sets of legal obligations.

Id. This reasoning has been noted approvingly by the Eighth Circuit as well in *Robinson v. Linomaz*, 58 F.3d 365, 369 (8th Cir. 1995) ("we are inclined to believe that the *Madonia* court's approach was correct") although *Robinson* was decided on different grounds.

Finally, the Ninth Circuit's ruling in *Stern* runs contrary to the Tenth Circuit's opinions in *Anderson v. Emergency Associates*, 860 F.2d 987 (10th Cir. 1988) and *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885 (10th Cir. 1988) relating to partial termination of a plan. Under ERISA, partial termination automatically vests the participants' interest in the plan. In those cases, the Tenth Circuit ruled that an ERISA plan could not be partially terminated by the voluntary departure of employees. In so holding, the Tenth Circuit reasoned that an employee's decision to leave a company is drastically different than an employer cutting its own work force, and that a plan could not be automatically terminated or even partially terminated by the voluntary departure of employees.

Similarly, had Ms. Mayersohn simply quit her employment at Stern, Inc., under the Tenth Circuit's reasoning the New Plan would not be partially terminated. There is little difference between an employee's decision to leave an employer and an employee's voluntary decision to marry the sole shareholder—particularly since she could have left and *then* married. Accordingly, a review of the case law

demonstrates a conflict with the Fourth, Seventh, Eighth and Tenth Circuits and certiorari should be granted to resolve the conflict once and for all.

CONCLUSION

For the reasons set forth in his opposition to Petitioner's petition for writ of certiorari, Respondent contends that this Court should not accept this case for review. In the event that the Court grants the Petition, however, Respondent submits that, to accord fairness and complete justice in this case, the Court should also grant this Conditional Cross-Petition to clarify that the pertinent date to review whether a plan qualifies as an employee benefit plan under ERISA is the creation date and not the bankruptcy petition date. In addition, the Court should provide guidance as to whether a plan that is otherwise qualified under Title I of ERISA can lose its qualifying status by the mere attrition of employees.

Respectfully submitted,

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